TALHA & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Chang Min Tat J.) June 25, 1971]

[Ipoh — Criminal Appeal No. 26 of 1971]

Penal Code, s. 378 — Theft — Agreement to purchase rubber land and payment of purchase price — Taking latex from trees on land before valid transfer.

The appellants had been respectively convicted of theft and abetment of theft of 3 katties of latex. The defence proved that the second appellant had not merely agreed to purchase the land from which the rubber was taken from the complainant and paid a deposit of $800 against the purchase price of $1,400 but also paid the balance before the date set for completion. The balance was in fact deposited with the second appellant's solicitor who had written to the complainant asking him to attend at his office to execute a valid transfer on payment of the balance.

Held, allowing the appeal: in respect of the land the complainant, while nominally the registered owner, was no longer the beneficial owner, but merely the bare trustee of the land for the second appellant. What the appellants took was from land the second appellant was entitled to. Therefore the conviction could not stand.

Case referred to:-

(1) *Public Finance Berhad* v. *Narayansamy* [1971] 2 M.L.J. 32.

MAGISTRATE'S CRIMINAL APPEAL.

Yeow Khoon Kwong for the appellants.

Haidar bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J. (delivering oral judgment): The appellants were charged in the Magistrate's Court at Sitiawan respectively with the theft and abetment of theft of three katties of latex. They were found guilty and by an extraordinary show of leniency, the magistrate did not record a conviction but bound them over under section 173A of the Criminal Procedure Code. The leniency was clearly influenced by the circumstances of the defence.

The defence of the appellants was conducted by counsel who proved in cross-examination beyond any shadow of doubt that the second appellant had not merely agreed to purchase the land from which the rubber was taken from the complainant and paid a deposit of $800 against the purchase price of $1,400 but also paid the balance before the date set for completion. The balance was in fact deposited with the second appellant's solicitor and the complainant was written to to attend at the office to execute a valid transfer on payment of this balance.

Despite this evidence, the learned magistrate called on the defence and, I suppose logically, on the appellants remaining mute of malice, convicted.

Now the definition of theft is contained in section 378 of the Penal Code and in explanation (p), it is expressly stated if A in good faith, believing property belonging to Z. to be his own property, takes that property out of B.'s possession, he does not take dishonestly and he does not commit theft.

In this particular case the second appellant had not taken property out of another man's possession other than the complainant's. He had taken the latex from the trees standing on land which he bought from the complainant. In respect of this land the complainant while nominally the registered owner of that land is no longer the beneficial owner of the land but is merely the bare trustee of the land for the second appellant. What the appellants took was from land that the second appellant was entitled to. The second appellant if he chooses to initiate action in court must be entitled to specific performance of the agreement of sale. Any doubt on this point was removed by the Federal Court's decision in *Public Finance Behad* v. *Narayansamy*.[1]

The conviction cannot stand.

The Deputy Public Prosecutor very correctly does not seek to maintain it. The appeal must be allowed. The order of the magistrate is set aside and an acquittal recorded.

Appeal allowed.

Solicitors: *Ngan & Tan.*

LOO CHUAN HUAT v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) July 7, 1971]

[Malacca — Federal Court Criminal Appeal No. 4 of 1971]

Criminal Law and Procedure — Jury trial — Summing up — Misdirection — Child witness — Direction to jury on corroboration.

Evidence — Trial — Child witness — Corroboration — Necessity for.

The appellant had been convicted of murder and sentenced to death. The prosecution case rested almost entirely on the evidence of a boy of 11 or 12 years old. On appeal,

Held, allowing the appeal: (1) although the learned trial judge in this case warned the jury of the risk of accepting the evidence of the child without corroboration, he did not invite them to consider their own experience of children and their capacity of confusing fantasy with reality. It is not sufficient merely to state the bare rule to a jury. It must be stated and illuminated in such a way that it will be a vital factor in the consideration by them of the issues before them;

(2) the warning given by the judge in this case lost much of its effect when he told them they had no reason to doubt the truthfulness of the child. Strong words were used to impress on the jury that the child's evidence was true thereby making it fruitless for them to look for corroboration;

(3) the learned trial judge held wrongly that the evidence of the elder brother of the child that the accused on that night was out looking for his mother was corroboration of the evidence of the child;

(4) in view of the serious misdirections in the summing up the conviction must be quashed.

Observations on sworn and unsworn evidence of children and the appropriate warnings to be given to juries in such cases.

Cases referred to:-

(1) *R.* v. *Baskerville* [1916] 2 K.B. 658.

(2) *Chao Chong & Ors.* v. *Public Prosecutor* [1960] M.L.J. 238.

(3) *Ravamanickam* v. *Public Prosecutor* [1966] 1 M.L.J. 60.

(4) *R.* v. *Campbell* [1956] 2 Q.B. 432, 438.

FEDERAL COURT.

R. Rajasingam for the appellant.

Gunn Chit Tuan (Deputy Public Prosecutor) for the respondent.

Azmi L.P.: We have allowed this appeal and we now give our reasons.

The appellant, Loo Chuan Huat, was tried in the High Court at Penang on a charge of murder under section 302 of the Penal Code. He was found guilty by the unanimous verdict of the jury and was sentenced to death. He has now appealed to this court

The prosecution evidence established beyond any reasonable doubt the following facts: At about 12.45 a.m. on August 25, 1966 a married woman named Goh Beng Guat (f) was found by the police lying in a pool of blood with a number of injuries. Beside her was her young son named Ooi Kean Lye, P.W. 3, aged 7 years old. He was also injured. They were found on Krian Road where there was a street lamp. Some 15 feet away from the injured woman, near a drain, the police found the blade of a kitchen knife which reasonably suggested that it was the weapon used for stabbing the woman and her son. The woman died of her injuries but the son lived to tell what happened on that fateful night. There was no other eye-witness to the crime and consequently the prosecution case rested almost entirely on the evidence of the boy He was about 11 or 12 years old when he gave evidence, some four years later, at the trial. He was not sworn but was cautioned by the trial judge to speak the truth. The main effect of his evidence was that the appellant was the man who killed his mother. Shortly stated, the material part of his evidence may be summed up as follows: Between 5 and 6 p.m. on the day in question the boy and his mother left their house in Malacca Street to go to a house in Irving Road, about 15 minutes walk, where the mother was to gamble. At about 12.30 after midnight, they left for home. On the way when they came near a side-lane off Krian Road, the boy heard a male Chinese calling to his mother and asking her to go into the side-lane. She went and the boy followed her. The boy said he stood about 14 feet away when his mother and the man were talking to each other. Then he saw the man pull out a knife and stab his mother. Seeing this he ran towards her in an attempt, he said, to protect her. He, too, was stabbed about four times in the stomach. According to him, the street lamp was in Krian Road about 10 feet away and the light from this street lamp, though not very bright, was sufficient to enable him to see clearly who the man was. This is what he said:

"... I saw the man who stabbed me. He was the same person who stabbed my mother. I saw him clearly when he stabbed me. I have seen this man prior to the incident. I have seen this man in my house before. I have seen him many times in my house. I know his name. His name is Ah Huat. He is here. He is the accused..."

Under cross-examination he added that he heard his mother cry out "Ah Huat, don't do this. Stop!" Asked about the street lamp in Krian Road he agreed with the defence counsel that the street lamp did not throw light in the side-lane. He said the lane was dark. But he went on to say:

"When this man called out to my mother, I knew who he was. He had been to the house and I could see him though it was dark..."

His evidence, as a whole, fairly suggests that he was certain that the appellant was the man who killed his mother. If the jury could accept him as a truthful witness, there was no reason why they should not act on his evidence and arrive at the conclusion that the appellant was guilty. As it happened, it seems clear that they believed him; hence the unanimous verdict of guilty. If the incriminating statement had come from an adult witness, it would be difficult, if not impossible, to suggest that the verdict was unreasonable. But the evidence was that of a child and as such it was governed by a special rule of practice which, over the years, has been accepted and applied in the courts of this country. The rule is that the jury must be warned that it is unsafe to act on the evidence of a child unless it is corroborated in material particulars implicating the accused. The leading English case of *Rex* v. *Baskerville*[1] has often been cited on the meaning of corroboration. We quote the following well-known passage from *Baskerville's* case (at page 667): —

"... We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only evidence that a crime has been committed but also that the prisoner committed it."

That case was concerned with the evidence of an accomplice, but the principle applicable is the same whether the evidence is that of an accomplice or of a child. Though in England, if the only evidence implicating the prisoner is that of unsworn children the judge should stop the case, the law here is that such evidence can be acted upon without corroboration. The learned trial judge has rightly said so in his summing-up. Our Evidence Ordinance does not exclude it But prudence requires that it should be corroborated. Hence it is called a rule of prudence which merely means that the evidence is not to be given weight unless it is corroborated in material particulars. The rule is based on human experience that a child, unlike an adult, sometimes finds it difficult to distinguish between realities and fantasies. That is, perhaps, one reason, if not the only, reason, for the rule. But it is desirable and important that the jury be informed of it so that they can properly evaluate or weigh the child's evidence in the light of other evidence before the court. The Federal Court of Appeal in this country had on two occasions emphasised that this should be done in summing-up to a jury. On both these occasions the convictions were quashed because of the failure or omission to inform the jury the reason why it was necessary to look for corroboration. We refer, of course, to the case of *Chao Chong & Ors.* v. *Public Prosecutor*[2] and the case of *Ravamanickam* v. *Public Prosecutor*.[3] In the earlier case, Thomson C.J. (as he then was) said on page 240:

"... One reason why children's evidence is regarded with suspicion is that ... Another reason, however, which in this country possesses undiminished force is that it is a matter

of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination. In our view something of the sort should have been put to the jury. At the very lowest they should have been invited to consider their own experience in connection with stories told by children. It was not sufficient merely to observe that there is a risk in acting on the uncorroborated evidence of a child. In any event we have grave doubts as to whether even so far as it goes that observation is strong enough. As was said by Lord Goddard in the case of *Mohamed Sugal Esa* v. *The King*: 'It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.' "

This passage was quoted in full by the same judge in *Ravamanickam* v. *Public Prosecutor, supra,* by way of a reminder that a summing-up which does not contain words having the effect of explaining to the jury the true reason for the rule is inadequate and, therefore, fatal to a conviction. With respect, we agree with the judgment in the two cases cited.

In the instant case one of the complaints by the appellant is that the judge has failed to adequately warn the jury of the danger of accepting the uncorroborated evidence of the boy. We are satisfied that the learned trial judge has more than once told the jury to look for corroboration before accepting the evidence. We are also satisfied that he has reminded them of the risk of accepting such evidence without corroboration. But we are not satisfied that he has done more than barely state this rule. Nowhere in the summing-up has the jury been invited to consider their own experience of children and their capability of confusing fantasy with reality. A lawyer may, perhaps, understand why a child's evidence should be corroborated. But jury are not lawyers. To them anything said in court by a person, regardless of his age, is something which can throw light on what has happened and such a person, if by his demeanour he appears truthful, would be readily believed even without corroboration. The following passage from the judgment of Thomson L.P. in *Ravamanickam* v. *Public Prosecutor, supra,* on page 61 deserves mention:

"... After all the rule as to corroboration is a living part of the law and it is not sufficient merely to state the bare rule to a jury. It must be stated and illuminated in such a way that it will be a vital factor in the consideration by them of the issues before them..."

That is one reason for allowing this appeal.

There is another reason. When a jury is warned to look for corroboration that can only mean that they must look for other evidence which can reasonably confirm the truthfulness of the child's testimony. But if at the same time the jury is also told that they have no reason to doubt the truthfulness of the boy the warning will lose much of its effect. That has been described as watering down the rule. Examples of watering down the rule are to be found in the following passages from the summing-up. One passage contains these words:

"... The defence is only a denial that he committed the act alleged. It is now for you gentlemen, to come to your finding. You have to decide whether you accept the evidence of this boy. He has given evidence which, in my view, was clear and fairly convincing. He has not tried to elaborate and concoct a story because he frankly told you 'I can't remember well what my mother was wearing' until he saw them in court. If he had made up this story, he would have told you what his mother was wearing. He could not even remember what he was wearing himself until he saw the clothing. He identified the accused because the accused had been to his house several times. Gentlemen, it is for you to say whether the child who suffered that shock of also being attacked and stabbed in the stomach would be likely to forget the face of his attacker even though he was then only 7 years of age. Would he forget that face? If it were something which did not concern him, or affect him so directly, it may be he could be mistaken or could forget. Do you think it likely that the child who went through that shock, who ran to his mother without thought for himself to try to help her and was then stabbed would forget that episode in his life? You would as a matter of prudence look for corroboration in the child's evidence before accepting it..."

In another passage the learned trial judge said:

"... As has been pointed out, the only evidence is that of the child (PW. 3). Are you satisfied he is telling the truth and that he was not here in this court to tell you a concocted story as to his presence that night? His presence there is confirmed by the injuries he claimed he suffered that night as the result of an attack on him when he tried to protect his mother. If he were older and wiser, he might have gone instead to try to get help. He would have appreciated the risk to himself but, as I said, without thought for his own danger, he ran to see what he could do for his mother. So his version of the incident on the night in question is more or less corroborated by the injuries on his person. Testing again whether his story is true, whether it was the accused who stabbed his mother, you will have to bear in mind the evidence of his brother (PW. 4) who said he saw the accused come to the house asking for his mother. That would tend, gentlemen, would it not, to lead you to the conclusion that there is truth in the story of this boy."

If the jury were considering the evidence of an adult we doubt if these words in the summing-up could give rise to any serious objection. We feel, however, that it would be understandable if they had come from the prosecuting counsel. That is beside the point. The point here is that strong words were used to impress on the jury that the child's evidence was true thereby making it pointless for them to look for corroboration.

The third and last reason for allowing this appeal is the manner in which the jury was directed as to the meaning of corroboration. The word "corroboration" appears in several places in the summing-up but nowhere was any attempt made to explain what it means. Ordinarily any confirmation of what is said by a person is corroboration. Confirmation in this case does not mean that there must be a witness who can testify to the fact that the appellant stabbed the deceased. If that be so, there was no need for the evidence. The fact that the appellant was seen leaving the side-lane about the time of the murder could be corroboration. So also the evidence that the appellant was found in possession of the handle of the knife recovered from the scene of the murder. There was, however, no such evidence in this case. The evidence of some importance was that of the elder brother of the boy. He said the appellant was out looking for his mother about 8.00 p.m. that night. But it clearly did not go far enough to corroborate the fact that the appellant was the murderer. It might raise some suspicion that he was. That too, is doubtful. But in this case it seems to have been put to the jury that they might regard

the evidence as corroboration. The learned trial judge said:

"... Whether that is corroboration or is not, you have the evidence of the elder brother that the accused on that night was out looking for his mother. He had testified that the accused cycled past his house three times earlier and finally questioned him as to the whereabout of his mother. He was told that his mother was out gambling..."

Having said that he proceeded to invite the jury to make certain assumptions saying:

"... You may assume that the accused would know where this gambling house would be because he had known the mother well and had been to her house many times. So he probably knew which road the woman would take when coming back from Irving Road to her house in Malacca Street. It may be he was lying in wait for this woman..."

In our view such an assumption is unreasonable as it is highly prejudicial. The fact that the appellant was looking for the deceased some four hours before she was killed need not necessarily suggest that he had any criminal intention towards her. There was no evidence of a quarrel between him and the deceased. On the other hand there was evidence that he had been to her house and had his meals there. There was absolutely no basis for the assumption. It would seem plain to us that there was nothing which could corroborate the younger boy's evidence. Be that as it may the learned trial judge seemed to have thought otherwise when he said this to the jury:

"... Testing again whether his story is true, whether it was the accused who stabbed his mother, you will have to bear in mind the evidence of his brother (PW. 4) who said he saw the accused come to the house asking for his mother. That would tend, gentlemen, would it not, to lead you to the conclusion that there is truth in the story of this boy..."

We are of the view that this is a serious misdirection which is fatal to the conviction.

One point, perhaps, requires observation: though the evidence of P.W. 4 was sworn evidence, he was nevertheless a young person and in our opinion the jury should have been warned of the risk of accepting his evidence. As Lord Goddard C.J. in *Reg.* v. *Campbell*[4] said:

"... The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though they may do so if convinced that the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult."

We have refused a request for a retrial because we could find no ground for it.

Appeal allowed.

Solicitors: *R. Rajasingam & Co.*

CHELLAPPAH RASADURAI v. SELVADURAI

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) July 7, 1971]

[Malacca — Federal Court Civil Appeal No. 7 of 1971]

Moneylenders — Loan in consideration of larger sum being paid — Whether amounts to moneylending within meaning of the Ordinance — Presumption — Onus on lender to rebut presumption — Moneylenders Ordinance, 1951, ss. 2, 3, 15 & 16.

The plaintiff/respondent claimed repayment of principal and interest on money lent to the defendant/appellant. By way of security, he obtained a charge over an interest in land held by the defendant/appellant. The defendant/appellant relied on sections 15 and 16 of the Moneylenders Ordinance, 1951. He alleged that the contract for the repayment of the loan was void and unenforceable, and counterclaimed for a declaration that the charge was also void and unenforceable. There was evidence that the plaintiff had lent money to the defendant/appellant and other persons in consideration of a larger sum being repaid. By section 3, "any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender."

The primary issue was whether the plaintiff/respondent was a moneylender within the meaning of the Moneylenders Ordinance? If he was then his claim would fail, it being conceded that he had no licence. The learned trial judge held that he was not a moneylender. The defendant appealed.

Held, allowing the appeal: on the plaintiff/respondent's own pleadings, it was clear that he had on two occasions lent money to the defendant/appellant in consideration of a larger sum being repaid, and therefore the statutory presumption under section 3 arose against him. There was no rebutting evidence in this case except a denial by the respondent that he was a moneylender. A mere denial is not enough. In the circumstances, the learned trial judge should have held that the plaintiff/respondent had not rebutted the presumption that he was a moneylender and that therefore the plaintiff/respondent's claim should have been dismissed.

Cases referred to:-

(1) *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory* [1962] M.L.J. 74 at p. 77, P.C.

(2) *Baju Ria* v. *Liau Kim Lian* [1965] 1 M.L.J. 128.

FEDERAL COURT.

Edgar Joseph for the appellant.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Suffian F.J.: On 31st October, 1960, the plaintiff lent the defendant $15,500. By way of security he obtained a charge over an interest in land held by the defendant. The plaintiff was to be repaid the loan on 30th April, 1961. The defendant did not repay it.

On a subsequent occasion the plaintiff lent the defendant $4,000.

The plaintiff alleged, and the defendant admitted, that interest was payable on the two loans.

The learned trial judge held that evidence relating to the payment of interest on the loans was not admissible. Before us counsel for the defendant conceded that it was admissible, and so there is no need for us to say whether the learned trial judge was right or wrong.

The plaintiff in the suit in the court below claimed the amount lent in the first loan (the second loan having been repaid in full), and also compensation for non-payment of interest as from 1st August, 1962.